MISCELLANY.

Depew on Lawyers.—"Business men may have a lucky stroke of fortune; preachers may buy or borrow sermons; quacks may win riches by a patent medicine; but the lawyer can rely on no one but himself. He is like the knight in the ancient tournament, when the herald sounded the trumpet, and he rode down the lists. Whether he splintered his enemy's lance, or was unhorsed himself, depended upon his own prowess and skill. Upon his advice men risk their character and fortunes. In the exigencies of the trial he wins or loses by his own knowledge of his case, his ability to draw from a well-stocked armory the principles to meet unexpected issues, his readiness to seize and turn to instant advantage testimony which can help to avert the force of that which can harm, by his trained ability to so discern and analyze amidst the mass of conflicting evidence the truth he seeks, and so present his cause to the court and jury, that he brings them both to his own convictions. This can only be done by thorough preparation and laborious study, continued all through life. It is very difficult, with no immediate motive to offer incentive, to study and read while waiting for clients. It requires discipline, and is discipline. It tests the question of fitness for the work of the profession."—*Hon. Chauncey M. Depew.*

Duty of Counsel to Uphold Dignity and Honor of Profession.—In Pelham & Havana R. Co. *v.* Elliott, 11 Ga. App. 621, 629, 75 S. E. 1062, Russell, J., delivering the opinion of the court said:

"It is the duty of counsel to guard, by the most scrupulous propriety of demeanor, in the conduct of a cause, the dignity and honor of the profession. Connected as it is, most intimately, with the administration of justice, it should be protected most vigilantly from falling into popular disrepute. It ought, as I verily believe it does, to command the respect of the wise, and the reverence of the good. Power and place—hereditary wealth—stupidity in high social position, and even genius, pandering to a popular taste for caricature, jealous of the power which it wields upon governments, have labored to degrade it. Still in this country and in England, if nowhere else, the bar is the ladder upon which men mount to distinction; the lawyer is the champion of popular rights; the class to which he belongs is more influential than any other; and counsel, yes, feed counsel, is indispensable to a fair and full administration of justice. When learning and character, and practised skill, and eloquence, and enthusiasm, chastened by discretion, are enlisted in behalf of the litigant, he may rest assured that he holds in his counsel the very best guarantee against all forms of wrong and oppression in the administration of the law. It is true that he is paid for his services—and what of that? Are not princes and premiers, presidents and priests also paid? One

thing never yet was bought with money, and that is the soul-engrossing identification of counsel with his client. It is the gratuitous bestowal of his sympathy, drawing forth the masterly powers of his genius and the rich treasures of his learning, that makes the great lawyer, the honored and influential citizen. The approval of conscience and the respect of good men are his reward; far richer than the stipulated fee of these days, or the honorarium of the Roman advocate."

"Pistle" as a Weapon—Chaucer as an Authority.—In Garza *v.* Texas, 222 Southwestern Reporter, 1105, the Texas Court of Criminal Appeals said: "The complaint and information charge appellant with carrying a 'pistle.' The testimony shows that he carried a 'pistol.' Objection was made to this testimony, on the ground of variance between the allegation and proof. It is urged that 'pistle' is a word meaning a communication, and that the well-known rules of idem sonans and bad spelling do not apply. Appellant's authority for asserting that 'pistle' is the name of a communication is the Century Dictionary. Reference thereto discloses that said work prints the word as obsolete, and quotes Mr. Chaucer, who wrote in old English some seven hundred years ago, as using it. We do not think that the fact that an early English poet, in the exercise of his license, should have used this word in that sense, would necessarily give it any standing at this time, or would likely mislead a Brazoria county Mexican, defended by a pair of able lawyers, into the mistake, in preparing for trial upon a charge of unlawfully carrying a pistle,' of seriously thinking himself charged with unlawfully carrying a communication. The word 'pistle' does not seem to be given in any of our other dictionaries, to which this court has access, and we are inclined to hold the word as used in the information and complaint herein, idem sonans with 'pistol,' and that the rule of bad spelling will apply."

A Free Advertisement.—The Docket publishes the follow clipping from the Winnett Times, of Winnett, Mont., without charge and we think such a hustler as the advertiser deserves a free advertisement in these pages:

C. L. YOUNG
Counselor at Law

Allied and Affiliated connections affording practice in all state and U. S. Courts.

Submit to no hold-up methods before seeing me. Consultation Free.

Office hours any time or place I may be found, night or day. No case accepted unless based on justice.

Putting White Patient in Colored Ward Not Libelous.—A cause of action cannot be maintained against a hospital for the insane, for

libel, by reason of an act of its officers and employees in putting a white patient in the part of the institution used for negro patients. The above holding is taken from the opinion of Commissioner Hooker of the Oklahoma Supreme Court in Collins *v.* Oklahoma State Hospital, 184 Pacific Reporter, 946. In the course of the opinion it was said however:

"In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected insurmountable barriers between the races when viewed from a social and a personal standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous per se to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy or contempt, or bring him into more disrepute, than a charge of this character."

Duty of Automobilist Whose View Is Obstructed.—Where the driver of an automobile is prevented from seeing the road in front of him by the glare, upon his wind shield, of the lights of a car overtaking him, he is held bound, in the California case of Woodhead *v.* Wilkinson, 185 Pac. 851, to look around the end of the wind shield, if that is the only way he can proceed in safety. The cases upon this question which are gathered in the note accompanying this decision in 10 A. L. R. 291 agree that, if a person driving an automobile at night finds himself blinded by a glare of light, he must take such precautions as are possible to avoid causing an injury by proceeding while thus unable to see what is before him.

In Hammond *v.* Morrison, 90 N. J. L. 15, 100 Atl. 154, where an automobile ran into a street car-conductor who had gone to the rear of his car to adjust the trolley pole, and the excuse offered was that the street lights were reflected into the eyes of the driver by the wind shield of his car, so that he was unable to see in front of him, the court said: "His own story demonstrates his lack of care. No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his wind shield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the de ndant was standing. Having seen fit to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being."

Likewise, in Jaquith *v.* Worden, 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827, it appeared that the defendant, while driving an automobile, turned into a busy street. After entering that street his car struck an unlighted machine standing in the street, knock-

ing it against the plaintiff, and injuring her. In an action to recover damages for the injuries, the defendant testified that he was so blinded by the headlight of an approaching street car that he could not see ahead; that he could not have seen a person, and that he did not see the machine until he struck it. It was held that, under his own testimony, he was guilty of negligence. The court said: "He was proceeding in utter disregard of the presence of other travelers or objects ahead of him. Had he been without eyes, he would have been in no worse position. To proceed at all, in the face of those conditions, was at his peril."

For the driver of an automobile to allow rain water to collect on the wind shield is determined in Schwalen *v.* W. P. Fuller & Co., 107 Wash. 476, 182 Pac. 592, 10 A. L. R. 296, not to be a violation of a city ordinance which provides that "no person shall drive any vehicle that is so inclosed, constructed, or loaded as to prevent the driver thereof from having a clear and unobstructed view to the front, rear, and on both sides." It is accordingly held that it was error to charge the jury that such a situation constituted negligence as a matter of law, and that the jury should have been charged as to common-law negligence in allowing the wind shield to become so clouded, and allowed to find whether, under the circumstances, that was negligence which was the proximate cause of the injury. This case also holds that fog and snow are not obstructions within the meaning of such an ordinance.—*Case and Comment.*

Injury by the Voluntary Act of a Stranger under the Workmen's Compensation Acts.—The case of Munro *v.* Williams (1920, Conn.), 109 Atl. 129, recently decided by the Connecticut Supreme Court of Errors illustrates the use of fiction to arrive at a commendable result under the Workmen's Compensation law, with the consequent obscuring of the true effect of the decision in extending the law. In that case, the claimant was the caretaker of his employer's grounds, his duties including the ordinary repair of structures on the grounds and the protection of property generally. There were some mischievous youths in the neighborhood shooting air rifles who, spotting him at work laying a brick walk in front of a building in which there were windows on all sides, shot in his general direction in order to get him to run after them. After duly driving them away as was his duty to protect the glass, he resumed his work on the walk. The boys, however, soon returned and again fired, striking him in the eye. The court awarded compensation, holding that "the claimant on the resumption of his former work, laying the walk, was still acting in his capacity as guardian against intruders and trespassers and as general protector of the property, differing in this respect from the ordinary employee engaged simply to lay brick." It seems clear that the

true effect of the decision is to award compensation to an employee for an injury received from the mischievous conduct of a stranger, merely because such an injury is incidental to another duty of that employee, in which he was not engaged at the time of the injury.[2] But it is ordinarily the work in which the employee is engaged at the time of injury that determines whether or not the injury arises out of the employment.[3]

It is beyond question that such an injury would be compensable if sustained by the employee while actually engaged in defending his empoyer's property; and this is true, even though it were not among his enumerated duties.[4] In cases arising out of assault by strangers, this being a risk to which every one in the community is exposed and from an agency which bears no relation to the employment and over which the employer has no control, the controlling factor in awarding compensation is special exposure to such risk.[5] This factor supplies the causal connection[6] which is necessary to satisfy the requirement of the vast majority of the Workmen's Compensation Acts that the injury arise "out of the employment." Such special exposure exists in any case where the nature of the employment necessitates contact with strangers who are seeking to commit assault or with strangers of questionable character generally. And so compensation has been awarded to a watchman,[7] a policeman,[8] a bartender,[9] a collector,[10] and

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[2] The court stresses the duty to drive the boys away; not the fact that he had already once chased them. The indication is strong that recovery would have been permitted even though he was struck by the very first shot.

[3] Although the time between the act of driving the boys away and the accident appears to have been short, this fact was not relied upon by the court; the whole tenor of the opinion is to make liability depend upon the nature of the duties placed upon the claimant rather than upon what he was doing at the time.

[4] *Baum* v. *Industrial Commission* (1919), 288 Ill. 516, 123 N. E. 625.

[5] 1 Honnold, *Workmen's Compensation* (1917), 421; *State* v. *District Court* (1918), 140 Minn. 470, 168 N. W. 55.

[6] *McNicol's Case* (1913), 215 Mass. 497, 102 N. E. 697, is the leading case on the meaning of the phrase "out of the employment."

[7] *Ohio Building Safety Vault Co.* v. *Industrial Board* (1917), 277 Ill. 96, 115 N. E. 149; *Engles Copper Mining Co.* v. *Industrial Accident Commission* (1919, Calif.) 185 Pac. 182; *Western Metal Supply Co.* v. *Pillsbury* (1916), 172 Calif. 407, 15 Pac. 491; but not where the assault is personal. *Walther* v. *American Paper Co.* (1916), 89 N. J. Law 732, 99 Atl. 263 (1917), 26 YALE LAW JOURNAL, 621.

[8] *Village of West Salem* v. *Industrial Commission* (1916), 162 Wis. 57, 155 N. W. 929. No recovery allowed in *Helburg* v. *Town of Louisville* (1919, Colo.), 180 Pac. 751, because of a limitation in the Act which excluded injuries intentionally inflicted by a third party.

[9] *State* v. *District Court* (1916), 134 Minn. 16, 158 N. W. 713; *Emerick* v. *Salvonian Roman Catholic Union* (1919, Sup. Ct. N. J.), 108 Atl. 223.

[10] *Schmoll* v. *Weisbrod & Hess Brewing Co.* (1916, Sup. Ct.) 89 N. J. Law, 150, 97 Atl. 723. Compensation was erroneously denied because the employer had no knowledge. This search for fault is a

a conductor [11] or other employee [12] who is made a prey to thieves by the possession of valuables belonging to the employer. Also where the employee, whatever his regular duties, is ordered specifically to reclaim stolen property [13] or to eject strangers.[14] It is a peril, in such cases, attached to the particular job.

The injury in the principal case from the standpoint of the ordinary employee engaged to lay brick merely, must be considered as one resulting from a peril attached to the particular location in which the employee was by his employment required to be. It was early held in England that "it is not enough for the applicant to say 'the accident would not have happened if I had not been * * * in that particular place.'" [15] But recovery is allowed where the particular locality is specially exposed to the risks of commonalty. And so in the cases of injury from the elemental forces of nature [16] and weather conditions,[17] recovery is predicated upon a finding of fact showing a greater degree of risk. In such cases, it would seem that the employer has not provided a safe place to work.

At common law, the duty rested upon the master to provide a place reasonably safe for the doing of the work required of the servant.[18] According to common-law principles, this duty was predicated upon fault and whittled away by the assumption of risk. It was only when the master knew of the conditions which made the place unsafe, either

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survival of the common-law theory of liability in a field where the common-law theory was sought to be changed. See (1917) 26 YALE LAW JOURNAL, 507; also COMMENT (1920), 29 YALE LAW JOURNAL, 669, 672.

[11] 11 N. C. C. A. 251.

[12] *Nisbet* v. *Rayne & Burn* [1910], 2 K. B. 689.

[13] *Nevich* v. *Delaware, L. & W. R. Co.* (1917, C. A.), 90 N. J. Law, 228, 100 Atl. 234.

[14] *Reithel's Case* (1915), 222 Mass. 163, 109 N. E. 951.

[15] *Craske* v. *Wicjau* (C. A.) [1909], 2 K. B. 635.

[16] In the lightning cases, the conflict in the decisions arises from the application of the same rule to the particular facts in each case. Recovery allowed: *Andrew* v. *Failsworth Ind. Soc.* (C. A.) [1904], 2 K. B. 32; *State* v. *District Court* (1915), 129 Minn. 502, 153 N. W. 119; *Moore* v. *Lehigh Valley R. Co.* (1915), 169 App. Div. 177, 154 N. Y. Supp. 620. Recovery denied: *Hoenig* v. *Industrial Commission* (1915), 159 Wis. 646, 150 N. W. 996; *Klawinski* v. *Lake Shore & Michigan Southern Ry. Co.* (1915), 185 Mich. 643, 152 N. W. 213. See *Griffith* v. *Cole Bros.* (1917), 183 Iowa, 415, 165 N. W. 577, where the cases are reversed and compensation erroneously denied because no violation of duty on the part of the employee could be found; *cf.* note 10, *supra*. *Central Illinois Public Service Co.* v. *Industrial Commission* (1920, Ill.), 126 N. E. 144 (injury from tornado).

[17] Freezing: *Larke* v. *John Hancock Life Ins. Co.* (1916), 90 Conn. 303, 97 Atl. 320; *McManaman's Case* (1916), 224 Mass. 554, 113 N. E. 287. Sunstroke: *Ahearn* v. *Spier* (1918), 93 Conn. 151, 105 Atl. 340; (1916) 26 YALE LAW JOURNAL, 76.

[18] Bailey, *Personal Injuries relating to Master and Servant* (1897), sec. 2895.

actually or constructively, that the duty to respond in damages for injuries resulting therefrom attached.[19] And even though he knew, it was only when the servant did not know, else the servant assumed the risk.[20] The compensation laws have totally eliminated both of these prereqisities to the employer's duty to pay damages. Fault [21] and consequently knowledge should be unnecessary and the fact that the employee knew of the dangerous condition no longer makes him a willing victim. In the principal case, it appears that the particular position in which the employee was required by his employment to be, was unsafe in so far as it exposed him as a target to the neighborhood boys. Had the employer known of this situation, it is undoubted law that recovery could be had as for injury arising out of the conditions under which the employee was required to work [22]—because the employer had not furnished a safe place to work. The risk is none the less real nor the position more safe for the employee because the employer did not know. It is submitted that, fault being eliminated, recovery in the principal case can be sustained as for an injury resulting from a risk attached to the particular location where the employee was required to be which made that location unsafe, even though the agency causing the harm was not under the control of the employer.[23]—*Yale Law Journal.*

Annulment of Civil Marriage for Refusal to Have Jewish Ceremony Performed.—In Rubinson *v.* Rubinson, 181 New York Supplement, 28, it appeared that the parties were united in a civil marriage at the office of the City Clerk in August, 1919, on the understanding that later on a Jewish ceremonial marriage would be performed. The parties never lived together after the civil marriage, and the evidence was to the effect that the groom, after several postponements, stated positively that he would not go through the Hebrew ceremony. It was held that the failure of the groom to keep his agreement amounted to a fraud, and that, as there had been no consummation of the civil marriage by cohabitation, the bride was entitled to its annulment.

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[19] 3 Labatt, *Master and Servant* (1913) 2398.

[20] *Ibid.*

[21] Swayze, *The Growing Law* (1915), 25 YALE LAW JOURNAL, 1; *Industrial Commission* v. *Aetna Life Ins. Co.* (1918, Colo.), 174 Pac. 589.

[22] *McNicol's Case* (1913), 215 Mass. 497, 102 N. E. 697; *Schmoll* v. *Weisbrod & Hess Brewing Co.* (1916), 89 N. J. L. 150, 97 Atl. 723.

[23] This position is supported by both English and American authority. *Thorn* v. *Sinclair* [1917] A. C. 127, 116 L. T. 609; *Kimbal* v. *Industrial Accident Commission* (1916), 173 Calif. 351, 160 Pac. 150. The vigorous dissenting opinion in the California case shows the difficulty of judges trained in common-law principles of liability to enforce a duty to pay when there is no fault. There is, however, authority contra: *Cennel* v. *Daniels Co.* (1918), 203 Mich. 73, 168 N. W. 1009.

Enforceability of "War Chest" Subscription.—At the time when the world war was still in progress, Mechanicville, N. Y., in common with numerous other cities, adopted the "War Chest" plan of raising subscriptions for various charitable purposes, a corporation for that purpose was formed, and subscriptions were taken by use of printed cards. Considerable dissatisfaction seems to have developed as to the disposition of funds and necessity of payment of deferred subscriptions, and the case of Mechanicville War Chest, incorporated, *v.* Butterfield, 181 N. Y. S., 428, is a result of an action on a partially unpaid subscription.

Judge McKelvey, of the Saratoga county court, states that in a case such as the present it is impossible to pass upon any question as to the mismanagement of funds, though such might be done if proper proceedings were instituted calling for interposition of the power of the courts in regard to visitation of corporations and associations. The court holds that the signing of the pledge card made defendant a member of the corporation, bound with implied knowledge of its certificate and by-laws, constituting an enforceable contract; that testimony as to defendant's understanding of the conditions and meaning of this contract was inadmissible, as there was no real claim of fraud asserted, nor any ambiguous or doubtful terms to be construed.

Literary Libel.—The publication of a supposedly fictitious narrative in good faith by a publisher of books was held in Corrigan *v.* Publishing Co. 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662, not to be a complete justification to an action for malicious libel contained in the book, even though the publisher was unaware of the existence of the person libeled, or that the libel was written of and concerning any existing person; that is, it was held that such facts were no defense to the recovery of compensatory damages, but that they might prevent the recovery of punitive damages by disproving actual malice, which must be shown to recover such damages. The court in this case said: "The fact that the publisher has no actual intention to defame a particular man, or, indeed, to injure anyone, does not prevent recovery of compensatory damages by one who connects himself with the publication; at least, in the absence of some special reason for a positive belief that no one existed to whom the description answered. The question is not so much who was aimed at, as who was hit."

The few cases which have discussed this question are in conflict, but the weight of authority seems to support the rule enunciated in the preceding case, that the publisher's ignorance of the writer's intention to libel, or of the libelous character of the article, is not a defense to his liability therefor. Thus, the publisher's ignorance that the book contained libelous matter is held in Curtis *v.* Mussey,

6 Gray, 261, to be no defense to an action for libel against a publisher of a book composed of the letters and speeches of a prominent man upon a public question, since the publisher was bound to know whether the publication contained libelous matter. And one who publishes, without malice, a libelous pamphlet on a privileged occasion, is held jointly liable with the writer of the pamphlet, in Smith *v.* Streatfield [1913], 3 K. B. 764, 82 L. J. K. B. N. S. 1237, 109 L. T. N. S. 173, 29 Times L. R. 707, where the latter was actuated by malice; since the latter's malice defeats the privilege also for the publisher.

It is stated in Thompson *v.* Powning, 15 Nev. 195, that proprietors of newspapers are not to be relieved from any liability on account of any ignorance, inadvertence, or thoughtlessness on their part, as to matters published. But it was held in Smith *v.* Ashley, 11 Met. 367, 45 Am. Dec. 216, that the publisher of a newspaper was not liable for a libelous article therein, where he did not know to whom the article applied, and supposed that it was a mere fancy sketch or fictitious story, although the writer intended the article to be libelous, and to apply to the plaintiff. The court said that, to charge the defendant, it must be proved that he published the libel wrongfully and intentionally, and without any just cause or excuse.

In the case first cited, the court remarks: "Publishers cannot be so guileless as to be ignorant of the trade risk of injuring others by accidental libels. Works of fiction not infrequently depict as imaginary, events in courts of justice or elsewhere actually drawn or distorted from real life. Dickens, in 'Pickwick Papers,' has a well-known court scene of which Mr. Sergeant Ballantine says in his 'Experiences' that Mr. Justice Gazelee 'has been deliverd to posterity as having presided at the famous trial of Bardell *v.* Pickwick. I just remember him, and he certainly was deaf.' Goldwin Smith, the distinguished historian and publicist, said of Disraeli's veiled attack upon him as the 'Oxford professor' in the novel 'Lothair' ('Reminiscences,' p. 171): 'He afterwards pursued me across the Atlantic, and tried to brand me, under a perfectly transparent pseudonym, if "Oxford professor" could be called a pseudonym at all, as a "social sycophant." There is surely nothing more dastardly than this mode of stabbing a reputation.' The power of Charles Reade's descriptions of prison life in 'It's Never Too Late to Mend,' and the abuses of private insane asylums in 'Hard Cash,' is undeniable, although the truth of some of his details was challenged. The novel of purpose, such as 'Uncle Tom's Cabin,' often deals with incidents and individuals not wholly imaginary. Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest."—*Case and Comment.*

Our Lawyer.

From the Cradle to the Grave.

When we are born and, for our sake,
Our parents great expense must face,
Who is it that will gladly make
A CHATTEL MORTGAGE on the place?
Our Lawyer.

When we for funds are sorely pressed,
Who is it that relieves our need,
Not with vague promises expressed,
But, by a good, sufficient DEED?
Our Lawyer.

And when our days are growing short,
Our tenancy about to cease,
Who is it, like a good old sport,
Obtains for us a longer LEASE?
Our Lawyer.

Who is it, when our married life
Is not laid out on true love's course,
That artfully defends "friond wife"
And gets for her a nice DIVORCE?
Our Lawyer.

Who is it, when we bid farewell
To earthly joys and sorrows, gone,
Will stand beside our bier and tell,
In mournful tones, "Thy WILL be done"?
Our Lawyer.

Who is it, when we speak of pay,
Says, with reproach, "There'll be no fee,"
"I'm glad to serve you, therefore pray
Don't ever mention pay to me"?
Our Lawyer (?).

The Docket.

Proverbs.—In Cook *v.* McCabe, 194 Pac. 633, 634, the Supreme Court of Kansas said:

"The chief standard, which it is said the court ignored, is, 'Let well enough alone.' It is said the proverb springs from the good sense and experience of mankind, and is a caveat which applies to courts as well as individuals. This is not the place to discuss at length the subject of secular proverbs, those oracular truisms which, as Edward Fitzgerald said, we have learned from the lips of grandmother and nurse, and have written in our copy books, but which we understand only as the years furnish occasion for practicing or experiencing them. Many proverbs abound in good sense, energy, and courage, compactly expressed, and help to 'drive the nail home.' Some are found to be nearly as impractical as the attempt to 'make a silk purse out of a sow's ear.' Others are ambiguous and capable of disastrous application, such as 'stuff a cold and starve a fever.' Others are untrue, and would smother the fire of aspiration in ashes of sordid realization. Nothing palls like possession. Progress depends on dissatisfaction with achievement, and 'a bird in the hand is' not 'worth two in the bush.' Very often proverbs offset each other. The one invoked is counterbalanced by 'Nothing venture, nothing gain,' and is the specific anodyne of the sluggard, the slacker, and the conservative, agitated by the call to action, to duty, and to improvement."